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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

20874

FILE: B-204517

DATE: February 22, 1982

MATTER OF: Veterans' Administration Medical Centers—Payment
of Alabama Public Utility License Tax

DIGEST: Veterans' Administration Medical Centers are not constitutionally immune from paying Alabama public utility license tax which was added to their bills by Alabama Power Company. Legal incidence of state tax, which is levied on vendor of services to United States, and which is not required by taxing statute to be passed through to consumer, is on vendor, not the United States. United States is not constitutionally immune from such vendor tax. Utility commission order requiring utility to bill customers for tax does not transfer legal incidence of tax to customers.

The Deputy Administrator of the General Services Administration has requested our decision on whether the Veterans' Administration Medical Centers (VA Centers) located in Alabama must pay that portion of their electric bills which represents a 1.8 percent increase in the Alabama public utility license tax. This increase was imposed by Alabama statute on the Alabama Power Company, which passed it on to its customers, including the VA Centers, in their electric bills. The tax pass-through was provided for in an order of the Alabama Public Service Commission (PSC). The Deputy Administrator requests this decision because the VA Centers purchase electricity under an area-wide contract between the General Services Administration and Alabama Power.

For the reasons indicated below, we conclude that the VA Centers are obligated to pay the portion of their bills attributable to the tax increase. The VA Centers should reimburse the Alabama Power Company for the payments they have withheld.

The license tax was levied by Alabama statute as follows:

"Each person, firm or corporation, * * * operating an electric or hydroelectric public utility shall pay to the state a license tax equal to two and two-tenths percent on each \$1.00 of gross receipts of such public utility for the preceding year * * *. Such license tax shall be paid to the department of revenue by check made payable to the treasurer and shall be paid quarterly, one fourth on October 1, one fourth on January 1, one fourth on April 1 and one fourth on July 1 * * *."
Code of Alabama § 40-21-53 (1975).

Public utilities in Alabama, including the Alabama Power Company, are regulated by the Alabama PSC. The PSC has authority to fix utility rates. On April 28, 1969, the PSC issued an order pertaining to the inclusion of taxes or license fees in utility bills. Although we do not have a copy of the PSC order, the relevant portion of it is quoted in the Deputy Administrator's submission, as follows:

"Bills shall be increased to offset the applicable proportionate part of any taxes, assessments, licenses, franchise fees or rentals which may hereafter be imposed upon the company by any Government Authority at rates higher than those in effect December 31, 1967, and which are assessed on the basis of meters, customers, the price of or revenues from electric energy sold or the volume of energy generated, purchased for resale or sold."
(Emphasis added by Deputy Administrator).

At the time this order was issued, the public utility license tax, at the rate of 0.4 percent, was part of the expenses which the Alabama Power Company could recover as part of its utility rates as set by the PSC. The tax was later increased to its current rate of 2.2 percent, and under the PSC order, the Alabama Power Company included the 1.8 percent increase as a line item in its customers' bills.

Initially, the VA Centers paid the portion of their bills attributable to the tax increase without protest. Subsequently, because of an opinion by Veterans' Administration attorneys that the United States was constitutionally immune from paying the tax, the VA Centers withheld the amount of the tax increase from their payments. Moreover, they also deducted an additional amount from their payments in order to recover the tax they had already paid.

Generally, the United States is not required to pay state or local taxes levied directly on its operations. This immunity is based upon the constitutional principle of sovereign immunity. 57 Comp. Gen. 59 (1977). However, a tax does not necessarily violate the Government's immunity merely because the Government must bear the financial burden of a tax levied on others. Id. at 59-60. Whether or not the United States is immune from a particular state tax depends on where the "legal incidence" of the tax falls under state law. If the legal incidence of a tax is on a vendor dealing with the Government, the United States, as a purchaser, is not immune from bearing the financial burden of the tax, which may be included by the vendor in its charges as part of the cost of doing business with the vendee. However, if the incidence of the tax under the state law is on the purchaser, the United States as purchaser is immune from paying that tax under the Constitution. Id. at 60; 55 Comp. Gen. 1358, 1359 (1976).

Some state tax statutes impose the tax on the vendor, but require the vendor to pass the tax on to its customers. In considering such

tax statutes, we have concluded that because the statute required the tax to be passed on the legal incidence of the tax fell on the customer, and the United States as customer was thus immune from paying the tax. See 57 Comp. Gen. supra, at 61, and cases cited therein.

As the quotation above indicates, section 40-21-53, Code of Alabama, imposes the public utility license tax on the utilities themselves. The statute does not require that the tax be passed through to the utility's customers, nor does it provide any mechanism for doing so. In our opinion, the statute clearly indicates the intent of the taxing body, the Alabama legislature, that the legal incidence of the tax be on the utility companies. We can find no hint of an intent that the incidence of the tax be transferred to the consumers of electricity.

The Veterans' Administration, however, argues that the 1969 PSC order requires that the tax be passed on to customers and thus transfers the legal incidence of the tax to those customers, including the United States. Therefore, it argues, it is constitutionally immune from paying the tax.

The Veterans' Administration argument has some merit. PSC is an authority of the State of Alabama, and its order, based on the quotation contained in the submission, appears to require utilities to include tax increases in their bills. However, in our opinion, in determining where the legal incidence of a tax falls, we must be bound by the intent of the taxing authority. Where the tax is imposed by statute, that intent must be determined, if possible, from the language of the statute itself. As we have indicated, the wording of the Alabama statute shows only that the legislature, the taxing authority in Alabama, intended that the utility companies pay the license tax. It says nothing about collecting the tax from anyone else. In our opinion, the order of the PSC merely provides that the utilities shall pass the economic burden of the tax to their customers as part of their rates.

Our conclusion is supported by United States v. Leavenworth, 443 F. Supp 274 (D. Kan. 1977), app. dismissed by stipulation of parties, No. 79-1241 (10th Cir.). In that case the City of Leavenworth, by ordinance, imposed a franchise fee on the Kansas Power and Light Company. The ordinance specified that the fee was to be paid by the utility and made no provision for passing the fee through to utility customers. However, the Kansas State Corporation Commission had ordered that all franchise fees must be directly charged to utility customers residing within the municipality imposing the fee. When Kansas Power and Light passed on the fee to Federal installations in the City of Leavenworth, the Government brought suit.

The district court examined the language of the ordinance and determined that the legal incidence of the fee fell on Kansas Power and Light. The court indicated that the ordinance

"* * * contains no provisions for collection directly from the United States, nor does it purport to authorize any procedures whereby penalties, for non-payment * * * may be sought against the United States property or its treasury. Furthermore, so far as the City's interest in collection is concerned, there is no requirement that Kansas Power & Light pass on to the United States all or any part of the financial burden of the franchise fee.* * *" Id. at 282.

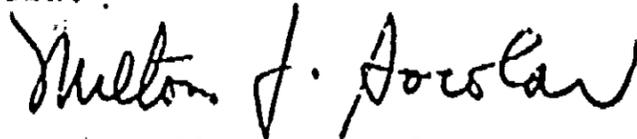
The court went on to say that the fact that the economic burden of the tax was passed on was not determinative of the legal incidence of the tax.

"* * * Nor does the fact that the United States may be required under Kansas State Corporation Commission orders to reimburse Kansas Power & Light for a pro rata share of the franchise fee alter the incidence of the tax as originally laid.* * *" Id. at 282-83.

The Leavenworth case was cited with approval in United States v. Maryland, 471 F. Supp 1030 (D. Md. 1979). The court in Maryland, after reviewing Leavenworth, stated:

"* * * In both cases, the statutory provisions in question, construed in light of all the circumstances, must control in determining where the incidence of the tax falls." Id. at 1040.

We therefore conclude that the legal incidence of the Alabama public utility license tax falls on Alabama Power Company, and not the United States. Therefore, the VA Centers are not constitutionally immune from bearing the economic burden of the tax. The VA Centers should return to Alabama Power the portion of their utility bills which they have erroneously withheld.

for 
Comptroller General
of the United States